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SUPREME COURT, U.S.

No. 98-1308

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAPITAL CURRENCY EXCHANGE, N.V., doing business as Chequepoint USA, and CHEQUEPOINT WORLDCASH, INC.,

Petitioners,

vs.

NATIONAL WESTMINSTER BANK PLC, BARCLAYS BANK PLC, HAMISH MARTIN VINCENT GRAY, LORD ALEXANDER OF WEEDON and JOHN MARTIN TAYLOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether section 12 of the Clayton Act, 15 U.S.C. § 22, precludes discretionary dismissal of antitrust claims under the common law doctrine of *forum non conveniens* in favor of the courts of another nation.

Whether the court of appeals properly upheld the district court's fact-specific application of the doctrine of *forum non conveniens* in dismissing the complaint in favor of the courts of England.

RULE 29(6) STATEMENT

Respondent National Westminster Bank Plc is a publicly-traded company that has no parent companies, subsidiaries or affiliates that have issued shares to the public.

Respondent Barclays Bank PLC has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public

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Respondents National Westminster Bank Plc, Hamish Martin Vincent Gray and Lord Alexander of Weedon (the "NatWest defendants") and Barclays Bank PLC and John Martin Taylor (the "Barclays defendants") respectfully request that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

A. Factual Background

Respondents National Westminster Bank Plc ("NatWest") and Barclays Bank PLC ("Barclays") are English corporations with their respective principal places of business in London. Pet. App. 2; Complaint, ¶¶ 3-4. The three individual respondents, Hamish Martin Vincent Gray, Lord Alexander of Weedon and John Martin Taylor are English residents and present or former officers or directors of NatWest or Barclays. Pet. App. 3; Complaint, ¶¶ 5-7. Petitioner Capital Currency Exchange, N.V. ("CCE") is a Netherlands Antilles financial services company with affiliates in eleven countries in Europe, the United States and Asia. Those affiliates include petitioner Chequepoint Worldcash Inc. ("Worldcash"), a New York corporation. Pet. App. 2; Complaint, ¶ 10.

Prior to 1995, respondent Barclays provided a variety of banking services to an affiliate of petitioners, Chequepoint (UK) Ltd. ("Chequepoint UK"), a British Virgin Islands company that does business in Great Britain. Pet. App. 2, 17. Chequepoint UK was not named as one of the plaintiffs in this action. Barclays terminated the banking relationship in 1995 for reasons the parties dispute. Thereafter, CCE and Chequepoint UK entered into negotiations to establish a

banking relationship with respondent NatWest, an effort that ended for disputed reasons with NatWest declining to provide such services. Pet. App. 3, 20.

Thereafter, petitioners CCE and Worldcash, but not Chequepoint UK, brought suit in the U.S. District Court for the Southern District of New York, alleging, *inter alia*, that Barclays, NatWest and the individual defendants violated sections 1 and 2 of the Sherman Act by denying banking services to CCE and its affiliates. Pet. App. 3. The claims asserted by petitioners arose from actions allegedly occurring in London relating to terminated or prospective banking relationships based in London. Pet. App. 17. As the lower courts found, most of the witnesses in the case reside in England, Pet. App. 16, where the significant events in dispute occurred and where virtually all documents are located, Pet. App. 16, 17. English witnesses include the employees of all parties who were directly involved in the facts at issue, Pet. App. 20-21, and significant non-party witnesses who are beyond the subpoena power of a federal district court, Pet. App. 22. The issues in dispute concern English banking practices involving a banking relationship between an English bank and a customer with its principal place of business in England. Pet. App. 17.[1]

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1. Petitioners contend that New York is the proper forum because of a letter of credit issued in New York in 1991 by Barclays in connection with a Worldcash money transmission license. Pet. 5-7. The Second Circuit rejected this contention below, finding:

> It is clear that, at bottom, this is a suit about two English banks' refusal to do business in England with CCE and Chequepoint UK. Plaintiffs have attempted to morphose this case into a dispute that concerns the United States

(Cont'd)

B. Proceedings Below

Respondents moved to dismiss the complaint on various grounds, including *forum non conveniens* and failure to state a claim. Pet. App. 3. The district court (Stanton, J.) granted the motions under the doctrine of *forum non conveniens*, finding that the doctrine was available in this case, that England offered an adequate alternative forum and that the public and private interests in the case favored litigation of the dispute in England. *See* Pet. App. 18-22.

The U.S. Court of Appeals for the Second Circuit affirmed, holding that the common law doctrine of *forum non conveniens* was available to dismiss claims asserted under the antitrust laws in the circumstances found in this case. *See* Pet. App. 1-17; *Capital Currency Exchange, N.V. v. National Westminster Bank Plc*, 155 F.3d 603 (2d Cir. 1998). The court of appeals considered and rejected petitioners' contention that the contrary result was required by this Court's decision in *United States v. National City Lines, Inc.*, 334 U.S. 573 (1948) ("*National City Lines I*").

(Cont'd)

> by discussing the letter of credit issued by Barclays UK to CCE in New York. However, the letter of credit is a red herring. The gravamen of plaintiffs' claims concern: (1) Barclay UK's alleged ploy to force CCE and Chequepoint UK into default on an English checking transaction; (2) Barclays UK's subsequent refusal to provide banking services in England to CCE and its affiliates; and (3) NatWest UK's refusal to provide banking services in England to CCE and its affiliates.

Pet. App. 17.

The Second Circuit agreed with the reasoning of a First Circuit decision authored by then-Chief Judge Breyer that "the Court in *National City Lines I* considered only domestic transfers; it did not consider international transfers at all." Pet. App. 9 (quoting *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 949 (1st Cir. 1991), *cert. denied*, 508 U.S. 912 (1992)).[2] After reviewing the decision in *National City Lines I*, the ensuing enactment of 28 U.S.C. § 1404(a) and the Court's subsequent decision in *United States v. National City Lines, Inc.*, 337 U.S. 78 (1949) ("*National City Lines II*"), the Second Circuit concluded that in *National City Lines II*, this Court "did not draw a bright-line distinction between transfers under § 1404(a) and the doctrine of *forum non conveniens*." Pet. App. 7, 10. The latter decision therefore "left open the possibility that an antitrust case could be dismissed under the *forum non conveniens* doctrine, even if § 1404(a) did not apply." *Id.* at 7. The court of appeals also concluded that it was bound by a prior Second Circuit decision in which it had rejected the argument that *National City Lines I* "foreclosed the availability of *forum non conveniens* when a statute has a 'special venue' provision like Section 12 of the Clayton Act," and had held that " 'the result in *National City [I] was* effectively overruled by Congress in 1948 when it enacted 28 U.S.C. § 1404(a),' " Pet App. 8 (emphasis original) (quoting *Transunion Corp. v. Pepsico, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987)).

Having concluded that *forum non conveniens* was available to dismiss petitioners' antitrust claims, the Second

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2. In *Howe*, the First Circuit held that *National City Lines I* did not preclude *forum non conveniens* dismissal of federal securities law claims despite a special venue provision modeled after section 12 of the Clayton Act. *Howe*, 946 F.2d at 950.

Circuit affirmed the district court's application of the discretionary factors articulated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). Pet. App. 10-17. The court of appeals specifically rejected petitioners' argument that English courts would not enforce the Sherman Act, citing well-settled law that *forum non conveniens* "is not trumped simply because the foreign forum will apply different substantive law than an American court." Pet. App. 12 (citing *Piper Aircraft Co.*, 454 U.S. at 249). In addition, the Second Circuit relied on petitioners' own English law expert in finding that because petitioners "may challenge defendants' allegedly anticompetitive actions under Articles 85 and 86 of the Treaty of Rome," they "may litigate the subject matter of their Sherman Act claims in England." Pet. App. 12, 13. The Second Circuit also agreed with the district court's finding that, because almost all of the witnesses and documentary evidence were in England, "private interests strongly favor litigation in England." Pet. App. 16.

The Second Circuit later denied petitioners' petition for a rehearing and suggestion for rehearing *in banc*. *See* Pet. App. 23.

REASONS FOR DENYING THE WRIT

The Second Circuit properly held that the common law doctrine of *forum non conveniens* may be applied to antitrust claims and further properly upheld the district court's discretionary, fact-specific application of the doctrine to dismiss this case in favor of the courts of England.

I.

THE SECOND CIRCUIT CORRECTLY HELD THAT THE COMMON LAW DOCTRINE OF *FORUM NON CONVENIENS* APPLIES TO ANTITRUST CLAIMS.

Petitioners' principal contention — that a court may in its discretion send an antitrust action to a more convenient domestic forum under 28 U.S.C. § 1404(a) but may not dismiss such a claim in favor of a more convenient foreign forum under the doctrine of *forum non conveniens* — misreads this Court's two decisions in the *National City Lines* case and ignores recent case law interpreting those decisions.

In *National City Lines I*, the Court considered whether section 12 of the Clayton Act, 15 U.S.C. § 22, the special venue provision of the antitrust laws, barred application of the doctrine of *forum non conveniens* to dismiss an antitrust suit brought in one federal district court in favor of litigation in another, more convenient federal district court. *See National City Lines I*, 334 U.S. at 576-77. After reviewing the legislative history of section 12 of the Clayton Act, the Court concluded that Congress had not intended to allow the doctrine "to deprive the plaintiff of the choice given by the section." *National City Lines I*, 334 U.S. at 588.

As the First Circuit observed in *Howe v. Goldcorp Investments Ltd.*, however, "the Court in *National City Lines I* considered *only* domestic transfers; it did not consider international transfers at all." *Howe*, 946 F.2d at 949 (emphasis in original). Far from expressing any rule barring dismissal of antitrust suits in favor of foreign tribunals, section 12 of the Clayton Act simply provides that venue in an antitrust suit lies "not only in the judicial district whereof [the corporation] is an inhabitant, but also in any district wherein it may be found or transacts business . . . ." 15 U.S.C. § 22.

As a matter of logic, the fact that section 12 provides a broader choice of domestic forums should have no effect on the availability of the common law doctrine of *forum non conveniens* in an international case. As the First Circuit reasoned in *Howe*,

> [i]f a *general* venue statute opening federal court doors (say, in New York) is compatible with an international *forum non conveniens* transfer . . . why does a special venue statute which simply opens another court's doors (say, in California) suddenly make the same international transfer unlawful?

Howe, 946 F.2d at 949 (emphasis in original).

National City Lines I was followed quickly by the enactment of 28 U.S.C. § 1404(a) and this Court's subsequent decision in *National City Lines II*, in which the Court found that the new statute "extend[ed] the doctrine of *forum non conveniens* to antitrust suits," and permitted transfer of such cases between federal district courts. *National City Lines II*,

337 U.S. at 79, 84; *see also Ex Parte Collett*, 337 U.S. 55, 61 (1949).[3] Both the First Circuit and the Second Circuit have observed that the decision in *National City Lines I* was "effectively overruled" by these subsequent developments. *Transunion Corp. v. Pepsico, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987); *see Howe*, 946 F.2d at 949; *see also Penwest Dev. Corp. Ltd. v. Dow Chemical Co.*, 667 F. Supp. 436, 438 (E.D. Mich. 1987).

Nothing in *National City Lines II* supports petitioners' contention that the Court intended to distinguish between domestic cases that are subject to section 1404(a) and international cases that are governed by the common law doctrine of *forum non conveniens*. *See* Pet. App. 7. Like *National City Lines I*, *National City Lines II* involved a purely domestic transfer from one federal district court to another. As the Second Circuit correctly stated, the Court in *National City Lines II* "did not draw a bright-line distinction between transfers under § 1404(a) and the doctrine of *forum non conveniens*," and the decision cannot be read to preclude the use of the common law doctrine in an international case. Pet. App. 7, 10.

Finally, the enactment of section 1404(a) reflects a more recent congressional intent to take into account the

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3. *National City Lines II* was one of three decisions issued on the same day in which the Court overruled prior decisions that had barred *forum non conveniens* dismissals in actions arising under statutes with special venue provisions. *See also Ex Parte Collett*, 337 U.S. 55 (1949) (FELA); *Kilpatrick v. Texas & Pac. Ry. Co.*, 337 U.S. 75 (1949) (FELA). The Court's reasoning in *Ex Parte Collett*, in which it characterized its earlier decisions as "judicial gloss," was incorporated by reference into the decisions in *National City Lines II* and *Kilpatrick*.

disadvantages that arise from litigation in an inconvenient forum. *See National City Lines II*, 337 U.S. at 81. As then-Chief Judge Breyer wrote in *Howe*, this "congressional policy strongly favoring transfers . . . removes whatever temptation one otherwise might have to engage in the legal fiction" that in drafting a special venue provision which omits any reference to transfers, Congress "somehow intended to take from the courts their long-established power to transfer a case when considerations of fairness and convenience so require[ ]." *Howe*, 946 F.2d at 949.

II.

THERE IS NO SIGNIFICANT CONFLICT BETWEEN THE SECOND AND FIFTH CIRCUITS.

There is no significant conflict between the decision of the court of appeals below and the Fifth Circuit decisions in *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876 (5th Cir. 1982), *vacated*, 460 U.S. 1007 (1983) (*per curiam*) and *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138 (5th Cir.), *cert. denied*, 493 U.S. 918 (1989). As the later decision in *Kempe* makes clear, *Mitsui* stands only for the proposition — expressly recognized by this Court in *Piper Aircraft* — that *forum non conveniens* dismissal is not appropriate when a foreign court will not permit litigation of the subject matter of a dispute.

Mitsui involved a claim by a U.S. firm that certain foreign entities had conspired to prevent the plaintiff from exporting lumber into the United States in violation of the antitrust laws. *See Mitsui & Co.*, 671 F.2d at 881. The Fifth Circuit reversed the district court's holding that Indonesia was the more convenient forum, citing *National City Lines I* for the broad proposition that *forum non conveniens* did not apply to

antitrust suits. *See Mitsui & Co.*, 671 F.2d at 890. The *Mitsui* court also concluded, however, that "*[e]ven without the authority of National City Lines*, we would reach the conclusion that antitrust cases cannot be dismissed" in favor of a foreign forum. *Id.* at 890-91 (emphasis added). It reasoned that sections 1 and 2 of the Sherman Act were penal in nature, that foreign courts were not obliged to implement those provisions and that dismissal thus would be the "functional equivalent" of placing defendants' conduct beyond the reach of the antitrust laws. *See Mitsui & Co.*, 671 F.2d at 891.

In *Kempe*, the Fifth Circuit revisited the issue in connection with a Bermudian insurer's RICO claims against corporate and individual U.S. citizens. *See Kempe*, 876 F.2d at 1140-41. The Fifth Circuit held that the RICO claim *could* be dismissed in favor of a more convenient foreign forum (although it did not accept the reasoning of the Second Circuit in *Transunion*, which reached the same result after holding that *National City Lines I* had been "effectively overruled"). *See Kempe*, 876 F.2d at 1144-45. The *Kempe* court made clear that, in *Mitsui*, "we proceeded to deny dismissal *on a very narrow and discrete ground — the impossibility of plaintiffs obtaining any remedy at all* for their antitrust-based claims in Indonesia." *Id.* at 1145 (emphasis added). Accordingly, the "critical issue" was not the continuing vitality of *National City Lines I* but rather whether dismissal would deprive plaintiffs of *any* remedy for the factual predicate of their complaint. *Id.*; *see also Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 829-30, 834 (5th Cir.) (similarly limiting *Mitsui* and following *Howe* to dismiss bankruptcy action in favor of courts of Germany), *cert. denied*, 508 U.S. 973 (1993).[4]

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4. In *Laker Airways Ltd. v. Pan American World Airways*, 568 F. Supp. 811 (D.D.C. 1983), a district court refused to apply *forum*

(Cont'd)

Kempe thus establishes that, in the Fifth Circuit, the common law doctrine of *forum non conveniens* is not categorically unavailable. Instead, its availability in that circuit turns on whether dismissal would deprive a plaintiff of "any remedy" whatsoever. This principle simply reiterates this Court's conclusion in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), that

> if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.

Id. at 254.[5]

To the extent that the Fifth Circuit has suggested that *National City Lines I* precludes application of *forum non conveniens* in international cases, it has done so without the benefit of the more recent, considered opinions holding otherwise. Those decisions include (among others) the 1991 decision of the First Circuit in *Howe v. Goldcorp Investments, Ltd.*, the 1987 decision of the Second Circuit in *Transunion*

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non conveniens in an antitrust action based on a finding that English courts did not recognize any remedy for anticompetitive conduct. *See id.* at 817. It is undisputed, however, that English law now provides a cause of action for the conduct at issue in this case. *See* Pet. App. 12, 19.

5. The decision in *Piper Aircraft* was decided while *Mitsui & Co.* was *sub judice* and received only passing attention in the Fifth Circuit decision. *See Mitsui & Co.*, 671 F.2d at 891 n.20.

Corp. v. Pepsico and of course, the Second Circuit's 1998 decision below.[6] While earlier decisions might have construed special venue provisions to inhibit the application of *forum non conveniens* in the international context, "most case law in recent years has taken [the contrary] position[ ] . . .". *Howe*, 946 F.2d at 949.[7]

III.

THE SECOND CIRCUIT PROPERLY UPHELD THE DISTRICT COURT'S FACT-SPECIFIC EXERCISE OF DISCRETION.

The Second Circuit properly affirmed the district court's fact-specific application of the discretionary *Gulf Oil* and *Piper Aircraft* factors to dismiss this case. Pet. App. 17. This Court should also accord substantial deference to the lower courts' exercise of discretion, including their conclusion that in an English proceeding,

> [p]laintiffs may challenge defendants' allegedly anticompetitive actions under Articles 85 and 86

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6. *See also Alfadda v. Fenn*, 159 F.3d 41, 47 (2d Cir. 1998) (RICO and securities law claims); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 952 (11th Cir. 1997) (RICO); *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 769 (9th Cir. 1991) (RICO and Lanham Act).

7. Contrary to petitioners' arguments, *see* Pet. 11, the Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), "merely note[d]" that if an arbitration clause operated "as a prospective waiver [of antitrust claims] . . . we would have little hesitation in condemning the agreement." *Id.* at 637 n.19. Moreover, in this case the courts below found that England provides a cause of action for the conduct at issue. Pet. App. 12, 19.

> of the Treaty of Rome . . . provisions [which] are roughly analogous to Sections 1 and 2 of the Sherman Act, and create a private right of action to challenge anti-competitive, monopolistic actions.

Pet. App. 12. *See Piper Aircraft Co.*, 454 U.S. at 257 (application of *forum non conveniens* entitled to substantial deference on appeal).

It is well-settled that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight" in *forum non conveniens* analysis. *Piper Aircraft Co.*, 454 U.S. at 247 (lack of strict liability did not render Scotland inadequate alternative forum). The Court in *Piper Aircraft* made clear that to permit *forum non conveniens* dismissal, an alternative forum would be deemed adequate provided only that it allowed "litigation of the subject matter of the dispute." *Id.* at 254 n.22.

Even petitioners' English law expert concedes that the *Piper Aircraft* standard has been met in this case. As the courts below observed, based upon petitioners' own submissions, "it is a position 'widely held by jurists that . . . infringements of Articles 85 and 86 [of the Treaty of Rome] give rise to an action for damages.' " Pet. App. 13 (quoting Alan Rupert Tyrrell, Q.C.); *see also* Pet. App. 19 (district court decision). No more is required to find the courts of England to be an adequate alternative forum for petitioners' antitrust claims.[8]

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8. Petitioners contend that Articles 85 and 86 are inadequate substitutes for sections 1 and 2 of the Sherman Act because they require a showing of an effect on "trade between Member States" of (Cont'd)

IV.

COURTS HAVE RECOGNIZED THE IMPORTANCE OF *FORUM NON CONVENIENS* IN INTERNATIONAL ACTIONS.

Petitioners' final contention that the decision of the court below will have some negative impact on international commerce was squarely addressed in *Piper Aircraft*, where this Court recognized that a rigid application of *forum non conveniens* in the international context would magnify the "flow of litigation into the United States . . . and further congest already crowded courts." *Piper Aircraft Co.*, 454 U.S. at 252.

In *Howe*, the First Circuit elaborated upon this theme:

> To insist that American courts hear cases where the balance of convenience and the interests of justice require that they be brought elsewhere will simply encourage an international forum-shopping that would increase the likelihood that decisions made in one country will cause (through lack of

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the European Community. But the real party in interest in this action does business primarily in Great Britain and, through affiliates, other EC countries, *see* Pet. App. 2, 17; Complaint, ¶¶ 23-24, and as a business engaged in international money transfers and exchange is hardly likely to founder on the need to show an effect on EC commerce. Indeed, an affiliate of petitioners (Chequepoint S.A.) filed a formal complaint with the European Commission against Barclays, "on behalf of the Chequepoint Group," alleging violations of Article 86 based on Barclays' withdrawal from its banking relationship with Chequepoint UK.

> awareness or understanding) adverse effects in another . . . And, to deprive American courts of their transfer power . . . only when[ ] one of more than three hundred special venue statutes applies, would create a hodge-podge, that would . . . bring about American adjudication of an essentially foreign controversy, depending on the pure happenstance of whether Congress — at some perhaps distant period and likely out of a desire to widen plaintiffs' venue choices in typical domestic cases — enacted a "special venue" provision.

Howe, 946 F.2d at 950. As the First Circuit concluded in that case, "[s]uch a result would seem thoroughly unsound." *Id.*

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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